U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: JANUARY 8, 2001

CASE NO.: 1999-LHC-2872

OWCP NO.: 07-117631

IN THE MATTER OF

DALTON DECUIR,
Claimant

v.

UNION OIL COMPANY OF CALIFORNIA
Employer

APPEARANCES:

Aubrey Denton, Esq.,
For the Claimant

John Hughes, Esq.,
Allen & Gooch
For the Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Dalton Decuir (Claimant) against Union Oil Company of California

(Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 20, 2000 in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called vocational expert, John William Grimes (Grimes), and introduced 7 exhibits which included a deposition of vocational rehabilitation counselor, Stephanie P. Chalfin (Chalfin) medical records from Drs. James Lipstate (Lipstate), John Schutte (Schutte), Milton J. Jolivette (Jolivette) and Lafayette General Medical Center, and reports from vocational experts, Grimes and Chalfin.[1] Employer introduced 5 exhibits including a deposition and records of Chalfin, records of vocational experts, Karen E. Keller (Keller) and Elizabeth Hoover (Hoover) and Claimant's workers' compensation payment records and a post-hearing deposition of Carthy McMahon (McMahon) of Intracorp.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JTX-1), and I find:

1. Claimant was injured on March 14, 1990.

2. The injury occurred in the course and scope of Claimant's employment.

3. An employer/employee relationship existed at the time of the injury.

4. Employer was advised of the injury on March 14, 1990.

5. A Notice of Controversion was filed on August 9, 1999.

6. Informal conferences were held on June 11, 1992 and July 27, 1999.

7. Claimant's average weekly wage (AWW) at the time of injury was $782.48 with a corresponding compensation rate of $521.66.

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[1] References to the transcript and exhibits are as follows: transcript: Tr.___; Claimant's exhibits: CX-___; Employer exhibits: EX-___; Joint exhibit: JTX-___

8. Employer paid Claimant temporary total disability benefits from March 15, 1990 through March 31, 1992 and permanent partial disability benefits from April 1,1992 through February14, 1994 at the weekly rate of $521.66. Employer continued paying permanent partial disability benefits to Claimant as follows: February 15, 1994 through May 9, 1994 at $294.98 per week; May 10, 1994 through July 28, 1994 at $322.17 per week; July 29, 1994 through February 27, 1995 at $294.98 per week; February 28, 1995 through June 14, 1999 at $408.32 per week; June 15, 1999 through August 9, 1999 at $189.53 per week; August 10, 1999 to the hearing date at $198.34 per week.

9. Claimant has a 20% disability of the left arm and shoulder.

10. Claimant reached maximum medical improvement on March 26, 1992.

II. ISSUES:

The unresolved issues confronting the parties are:

1. Claimant's proper rate of compensation from the date he reached maximum medical improvement on March 26, 1992 to present and continuing.

2. Whether Claimant's rate of compensation should be reduced when attending ULL and taking remedial course in 1993 and 1994 and when attending a full time approved DOL rehabilitation program leading to an associate degree in industrial technology at Louisiana Technical College.

3. Interest and Attorney Fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 40 year old married male born on September 10, 1960 with three children. (Tr. 50). On March 14, 1990, Claimant dislocated his left shoulder as he attempted to swing from a work boat to a fix platform, Vermillion 45 Platform located in the Vermillion 46 field. (Tr.51). Dr. Schutte performed reconstructive surgery on May 14, 1990, followed by shoulder manipulation on September 17, 1990. (CX-6). Claimant underwent similar procedures by Dr. Schutte in 1988 when he injured his right shoulder while

at work. On April 11, 1988, Dr. Schutte released Claimant to full duty with a 5% impairment. (CX-1, pp. 86-93, 95-97).

Prior to his injury Claimant had only a 12th grade education. In 1993 and 1994, he attended University of Louisiana at Lafayette, ULL (formerly known as University of Southwest Louisiana, USL) and completed remedial work. In August, 1995, Claimant, pursuant to an approved DOL rehabilitation program was evaluated by vocational expert, Grimes and subsequently entered Lafayette Regional Vocational Technical School (LRVTS) in November 1995, taking classes in electronics technology. The initial program was scheduled to be completed in 15 to 18 months. However, while Claimant was enrolled at LRVTS, the school was converted to a college, Louisiana Technical College, and Claimant's program was lengthened to allow him to achieve an associate degree in August, 1998.[2] (Tr.39, 52-56).

In 1990, Dr. Schutte treated Claimant on nine occasions: March 20, April 17, May 8, 9, June 26, July 17, August 28, October 2, and November 6, 1990. (CX-1 pp. 86-92, CX-2 pp. 12-21). In 1991, Dr. Schutte saw Claimant on four occasions: January 17, February 28, April 30 and July 18 during which time Claimant complained of left shoulder discomfort with restricted range of motion and extension. In 1990, Dr. Schutte provided several assessments of Claimant's restriction essentially concluding that Claimant had left shoulder instability and should avoid overhead work, heavy lifting and repetitive work, assigning a 20% disability to each shoulder. (CX-2 pp. 6-11). In 1992, Dr. Schutte saw Claimant on two occasions: February 25 and April 7, 1992, finding that Claimant had symptoms of fibromyositis, left shoulder pain due to rotator cuff tendinitis, and cervical disc disease causing neck pain. (CX-2, p.1). On March 26, 1992, Dr. Schutte advised Employer that Claimant had a 20% permanent impairment to each shoulder, with restrictions in external rotation and forward elevation. (CX-2, p. 2).

Dr. Lipstate, an internist with an arthritis speciality, began seeing Claimant in September, 1991, on a referral from Dr. Schutte. The first visit was on September 5, 1991, during which Dr. Lipstate confirmed reduced range of motion and pain in the left shoulder, which he attributed to either adhesive capsulitis and scar tissue development post-surgery or rotator cuff insufficiency or chronic tendinitis/bursitis. (CX-1, p. 78-82). In 1992, Dr. Lipstate saw Claimant on these occasions: April 30, June 30, August 31, during which time Claimant continued to complain of shoulder pain for which medication was prescribed. (CX-1, pp. 74-79).

On June 1, 1992, Dr. Lipstate opined that Claimant was at maximum medical improvement (MMI), with Claimant never able to work offshore again. (CX-1, pp. 31-32). In August, 1992, Dr. Lipstate completed a functional capacity evaluation which stated that Claimant was limited to lifting 10 pounds with the left arm and 20 pounds with the right arm and stated that Claimant should do well in vocational rehabilitation. (CX-1 p. 22).

In 1993, Dr. Lipstate saw Claimant on February 1, March 17, May 4, and July 22. On February 15, 1993, he issued an assessment of Claimant's condition limiting Claimant to 20 pounds frequent lifting and

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[2] Claimant finished classes in February, 1998, but did not graduate until August 1998.

30 pounds occasionally and with occasional postural activities and standing/walking and sitting up to 6 hours daily. (CX-1, pp. 16, 28, 100-102).[3] In 1994, Dr. Lipstate saw Claimant on March 8, April 12 and October 26. On the April 12, 1994 examination, Dr. Lipstate assessed the following limitations: frequent lifting-15 pounds; occasional lifting 25 pounds and stated that Claimant's shoulders problems prevented him from ever returning to offshore work. (CX-1, p.114).

Claimant continued seeing Dr. Lipstate on at least seven occasions in 1995, 1996 1997, 1999, and 2000 for essentially the same complaints. (CX-1, pp. 41-63). On April 24, 1996, Dr. Lipstate provided the following assessment: occasional lifting of 20 pounds, carrying 10 pounds, pushing, pullling crawling, climbing and reaching above shoulder level with total avoidance of unprotected heights. (CX-1, pp. 107-108). On June 10, 1999, Dr. Lipstate approved the following job positions provided by Carthy A. Mahon, a rehabilitation specialist for Intracorp: computer operator and home support person. (CX-1, pp. 57-59).

Following a July 23, 1999 examination, during which Claimant continued to complain of shoulder discomfort, Dr. Lipstate diagnosed fibromyalgia and bilateral rotator cuff injureis with shoulder, back and leg pain and found Claimant capable of light work. Treatment records from Dr. Jolivette confirm Claimant's complaints of shoulder pain. (CX-3).

When injured Claimant was employed as an apprentice field operator earning $14.85 per hour working six hours of overtime per week. Claimant was hired on October 11, 1999, as a water production plant operator for the City of Lafayette making $9.51 per hour, 40 hours per week or about $20,000 per year. (Tr, 40,41). At the time of his injury, this position paid $6.79 per hour. (CX-5). Claimant's first job following his injury was in September, 1998, when he went to work as a coach for Holy Family Catholic School. Claimant worked at this job for nine months or until June, 1999, making $11,300. In August, 1999, he accepted a computer teaching position at Immaculate Heart of Mary School at which he made about $667. (Tr. 36, 56, 57, 60).

B. Claimant's Testimony

Claimant's testimony dealt with his work history, injury, medical treatment, pre and post- injury education and his attempt to secure additional jobs after completing his education. Claimant testified that he had worked ten years for Employer. Following the injury and subsequent shoulder surgery, Claimant enrolled in ULL in an attempt to pursue additional education, so as to increase his job potential. Claimant took remedial reading, math and academics skill course. After being accepted into an approved DOL rehabilitation program, Claimant with assistance from Grimes enrolled in an industrial technology program followed by an associate degree program at Louisiana Technical College. (Tr. 52-55).

Claimant finished classes in February, 1998, and graduated the following August. Immediately, upon

[3] The record contains multiple copies of the same documents.

finishing class work, Claimant with Grimes' assistance began to search for work. As part of his job search Claimant applied for jobs identified by McMahon. Claimant also followed up on newspaper ads, all with no success. (Tr. 56-59). Finally in August, 1998, Claimant secured nine months of employment as a coach making $11,300 with a potential for teaching computer skills at Immaculate Heart of Mary School. Claimant quit when his attempt to become a computer teacher failed to materialize. In August, 1999, Claimant took a computer teaching position at Holy Family School paying $667 per month. When a better paying position as a water treatment operator became available with the City of Lafayette, Claimant quit his job at Holy Family and began working at the water treatment position making an annual salary of $17,000. (Tr. 60-61).

On cross, Claimant admitted not working from 1992 until completion of his education. Claimant confirmed his search for work with Grimes' assistance applying without success at various employers and finally securing a teaching position at Holy Family. Claimant sent in resumes, but got few interviews. Claimant continued looking for higher payment jobs after accepting a position at Holy Name and as noted above was successful in achieving a position with the City of Lafayette that initially paid $17,000 annually. As of the hearing date, Claimant had received several salary increases and was making $19,000+ annually. (Tr. 63-66). Claimant also worked with McMahon, but was unsuccessful in being employed as either a computer operator or an in house computer support person. (Tr. 59).

C. Testimony of Vocational Experts, Grimes, Chalfin and McMahon

Grimes' testimony dealt with his appointment by DOL to assist Claimant's rehabilitation efforts followed by a description of the services he provided and Claimant's participation in the program. Grimes provided an initial assessment, and development of a vocational plan, which showed that with retraining Claimant could earn increase wage in excess of his then current potential which had been reduce to minimum wages of $4.25-$6.50 per hour. (Tr. 28; CX-4).

After assessing Claimant's potential, Grimes found Claimant better suited for a technical program and helped Claimant enroll in a full time, 8 am to 2:40 pm, 5 day a week, industrial technology program at Lafayette Regional Vocational Technical School, which was subsequently changed to an associate degree when Lafayette Regional changed its name to Louisiana Technical College. (Tr. 29-35). Grimes then described Claimant's work attempts and the appropriateness of the jobs he subsequently secured. (Tr. 36-40). On cross, Grimes testified that Claimant, as a result of his training, was able to do instrument and electronic repair, including installation of security systems, making between $10 to $12.00 per hour. (Tr. 43, 44).

Chalfin testified that she did a vocational assessment of Claimant on August 10, 2000, and stated that Claimant's current job was appropriate considering his additional education. Chalfin testified that Claimant's current water treatment job paid $6.80 at the time of Claimant's injury. Further, Claimant's training did not enable him to repair computers, but rather repair electronic equipment such as TVs and VCR's. Chalfin described his present job as testing water samples and reading meters. (Chalfin Deposition).

McMahon testified that she met with Claimant in May, 1998, after reviewing prior medical reports

from Drs. Schutte and Lipstate and vocational reports from Grimes, Keller, and Hoover. McMahon reviewed and confirmed the accuracy of prior vocational assessments and learned from Claimant that he was considering taking a coaching job with computer lab work at Holy Rosary School. McMahon met with Claimant at Job Service and reviewed job openings.

McMahon testified that she subsequently performed a labor market survey identifying computer trainer, computer operator and in-house computer support person positions, but Claimant allegedly failed to apply or be interviewed for such position which paid between $16,500 and $22,000 per year. (EX-5, pp. 10, 11). McMahon had no knowledge about the availability of these positions in March, 1990. (EX-5, p. 12). McMahon last met with Claimant in February, 2000, at which time he had already been working as a water plant operator for the City of Lafayette. McMahon played no role in helping Claimant secure this position.

McMahon testified that Claimant was cooperative with her and when meeting with Claimant in 1998, sought out jobs she identified. (EX-5, p. 21). McMahon confirmed the fact that Claimant's current job utilized some of the skills he had acquired in his technical courses. (EX-5, p. 24).

D. Employer Exhibits

Employer deposed McMahon as noted above and relied upon vocational reports from Hoover, Keller and McMahon and worker's compensation payroll records. (EX-1, 2, 3, 4). Hoover began the initial vocational assessment on July 6, 1992, when she administered the Adult Basic Learning Examination Level 3 and Slosson Intelligence Test and recommended an additional meeting with Claimant to discuss test results, develop a return to work plan, and discuss appropriate rehabilitation services with DOL representative, Moffett who eventually selected Grimes to develop a workable rehabilitation program. On August 5, 1992, Hoover met with Claimant, reviewed testing results, and encouraged Claimant to pursue an associate degree in industrial technology to maximize his earning potential.

On August 24, 1992, Keller received a physical capacities evaluation from Dr. Lipstate that released Claimant to light duty work, inquired into an associates degree program at ULL (then known as USL), encouraged Claimant to register immediately at ULL because classes had already commenced. On September 24, 1992, Keller completed a labor market survey showing Claimant with only a minimum wage earning potential of $5.00 per hour, but did not identify any jobs.

On October 29, 1992, Keller reported receiving a work restriction evaluation form from Dr. Schutte releasing Claimant to full time work at a medium level with alleged abilities to lift 75 pounds. However, the record does not contain this report. Keller also reported meeting with Claimant on October 15, 1992, in which Claimant agreed to enroll as a part-time student at ULL and to begin classes on January 18, 1993. In January, 1993, Claimant registered for remedial work at ULL having obtained only a ACT score of 14 instead of 16 required for DOL rehabilitation assistance in the associate degree program. On February 19, 1993, Keller reported that Claimant had registered in remedial work at ULL and had closed her file. (CX-

3).[4]

On December 21, 1992, Employer had Claimant undergo a second vocational evaluation by Keller. Keller reviewed Claimant's work history and medical condition including reports from Drs. Lipstate and Schutte with Dr. Lipstate restricting Claimant to sedentary type jobs not lifting overhead or carrying objects greater than 10 pounds on a repetitive basis with Dr. Schutte recommending no heavy lifting or repetitive overhead work. Keller described Claimant's past work as assembly line and machine press operator making $5.00 per hour and his position with Employer as a field operator making $14.86 per hour averaging $3,200.00 per month. Keller concluded that Claimant was not able to do his former work with Employer but could perform work in the sedentary to medium range making between $4.25-$6.50 per hour. Keller then recommended a consult with Dr. Schutte on January 19, 1993, obtaining additional and final work restriction and conducting a labor market survey to identify jobs allegedly within those restrictions.

On January 19, 1993, Keller obtained a physical assessment of Claimant's work restrictions from Dr. Schutte in which he restricted Claimant as follows: intermittent lifting up to 50 pounds and intermittent climbing. On January 26, 1993, Keller performed a labor market analysis based upon a review of job listings from the Louisiana Department of Labor, Job Services Division in Lafayette showing the following jobs allegedly suitable for Claimant. They included: dump truck driver, night manager, cashier, parts clerk, insurance sales, sales route driver, deliverer, and fast food worker with wage ranging from $ 4.25 per hour to $800 per month. None of these jobs identified any specific employer, nor listed the physical demands of any position. Most of these positions required past experience except for insurance sales, deliverer and fast food worker. Keller also provided twenty-four other positions which she identified as appropriate from newspaper ads from the Lafayette Daily Advertiser which included: manager trainee, customer service representative, food delivery, fast food crew person, waiter, cashier, car wash attendant, telephone solicitor, night auditor, pest control technician, armour car driver, front desk position, car sales, alarm representative. Keller concluded that Claimant had an earning potential of at least $4.25 to $6.50 per hour with wages up to $12.00 per hour with a CDL license which Claimant did not possess. (CX-2). None of the newspaper listings detailed any physical job demands.

IV. DISCUSSION

A. Contention of Parties

Claimant contends that he was temporarily and totally disabled and entitled to full benefits including a weekly compensation rate of $521.66 from his injury on March 14, 1990 until March 26, 1992, when he reached maximum medical improvement (MMI). Thereafter, from March 27, 1992 until September, 1998,

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[4] No page cites are provided since Employer neglected to consecutively number each page of his exhibits choosing rather to label the beginning of each document.

when he began working for as a coach at Holy Family Catholic School in Lafayette, he was entitled to permanent total disability benefits at the same weekly rate of $521.66. Thereafter, Claimant was permanently and partially disabled working from September, 1998, to May, 1999, at Holy Family Catholic school making an annual salary of $11,300. In September, 1999, he earned $667 as a computer teacher at Immaculate Heart of Mary School in Lafayette followed by a full time job with the City of Lafayette in October, 1999, as a water treatment operator making an annual salary of $17,000 which at the time of the hearing had increased to $20,000 annually.

Claimant argues that Employer improperly reduced his benefits commencing February 15, 1994 and never established any suitable alternative employment until his first employment with Holy Family Catholic School in September, 1998. Further, from September, 1993, through December, 1994, and from November, 1995, through mid February, 1998, he was involved in vocational rehabilitation at ULL and Louisiana Technical College and pursuant to Board and Fifth Circuit precedent was entitled to permanent total disability during such retraining.

Employer contends that as of the January 23, 1993 labor market survey of Keller which identified numerous suitable jobs for Claimant with hourly wages between $4.25 and $6.50 per hour resulting in a weekly wage earning capacity of at least $170.00, Claimant went from permanent total to permanent partial status reducing his compensation rate from $521.66 to $408.32 per week. Employer argues that Claimant's compensation should be reduced, notwithstanding the fact that in 1993 and 1994 he was enrolled at ULL in remedial course, and thereafter, from November, 1995, through February, 1998, Claimant was enrolled and successfully completed an DOL approved rehabilitation program requiring full time attendance at Louisiana Technical College, resulting in Claimant earning an associate degree in industrial technology.

Employer is aware of language of Abbot v Louisiana Ins. Guaranty Assoc., 40 F.3d 122 (5th Cir. 1995) affirming 27 BRBS 192 (1993) where the Board and Court approved a claimant receiving permanent total disability compensation when enrolled in approved DOL rehabilitation program precluding employment, but argues Claimant was not entitled to full benefits while enrolled in remedial work at ULL, because allegedly, there was no testimony to indicate Claimant could not have worked during this time period.

Regarding Claimant's compensation rate while working for the City of Lafayette, Employer argues that it established suitable alternative employment with an earning weekly potential of $480.00. From February, 1998, through October 10, 1999, Employer contends that Claimant had a wage earning capacity of $8.00 per hour or $320.00 per week based upon Grimes testimony, and thus, should be compensated at a weekly rate of $308.30.

B. Credibility of Witnesses

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not

bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co., v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

In this case, I was impressed by the sincerity and candor of both Claimant and vocational expert Grimes, who described Claimant's work history, rehabilitation efforts and attempts at finding better paying employment. It is uncontested that Claimant assiduously applied himself and achieved an associate degree despite various obstacles thereby raising his hourly pay from minimum wage to $20,000 + annually. I credit Claimant's testimony that he applied for but was unsuccessful in obtaining the computer positions identified by McMahon. I also credit his testimony that he diligently sought suitable work, but was unable to find any until he secured employment with Holy Family School.

C. Nature and Extent of Disability, Suitable Alternative Employment, Vocational Rehabilitation

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968); Seidel v. General Dynamics Corp., 22 BRBS 403, 407(1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91(1989). Care v. Washington Metro Area Transit Authority, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A

condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, Leech v. Service Engineering Co., 15 BRBS 18(1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446(1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. V. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C & P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1(CRT)(D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128(1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224(1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679(1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that a claimant is reasonably capable of performing, are these jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, the burden shifts back to a claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Williams v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp., v. Director, OWCP, 748 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If a claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64(1985).

Employer contends that it established suitable alternative employment as of a January 26, 1993 labor market survey completed by Keller which relied upon a physical capacities form completed by Dr. Schutte on January 19, 1993. Inasmuch as Keller did not testify, I must look to her report to see if she set forth in detail the physical demands of each job. A review of that labor market survey shows that she failed to describe the physical demands of any job. Further, she made no contact with any specific employer to find out the specific nature of any job relying instead upon jobs listing found at Louisiana Department of Labor, Job Services Division and local newspaper ads. Reliance upon newspaper ads is clearly inappropriate, for it like the jobs lists at Job Services, fails to describe the precise nature of the work to be performed. Manigualt v. Stevens Co., 22 BRBS 332 (1989).

Additionally, Keller without explanation did not consider the restrictions imposed by Claimant then treating physician, Dr. Lipstate. Instead she relied upon Dr. Schutte's estimate of Claimant's work capacity, notwithstanding the fact that Dr. Schutte had not seen or treated Claimant since April 7, 1992. I find Dr. Lipstate's evaluation of Claimant's impairments to be more detailed and reliable considering the recency and multiple number of times he treated Claimant. Thus, I find that Keller failed to establish the suitability of any job rendering Employer's reliance on such misplaced. Employer moreover does not establish suitable alternative employment by relying upon general information about wage earning potentials.

Suitable alternative employment was not established until Claimant began coaching in September,1998, at Holy Family Catholic School, at which point he went from permanent total to permanent partial disability. I find no merit in Employer's argument that he should be treated as having an earning capacity of $4.25 when enrolled at ULL for this training was related to and helped him succeed at achieving his associate degree at Louisiana Technical College, and further, Employer failed to show any suitable alternative jobs paying this wage. Claimant does not have the burden of showing that he could not work while attending ULL. Thus I find, contrary to Employer, that Abbot, id. applies to not only the approved DOL plan but also Claimant's remedial education allowing him to successful complete his degree program at Louisiana Technical College. Claimant is entitled to full benefits while undergoing such retraining.

Regarding the issue of Claimant's post-injury earning capacity, an award for a partial, non scheduled disability is based on 66 2/3% of the difference between Claimant's pre-injury average weekly

wage and his post-injury wage earning capacity adjusted to account for inflation to represent the wages that the post-injury job(s) paid at the time of Claimant's injury. Quan v. Marine Power & Equipment Company, 30 BRBS 124(1966). In adjusting for inflation the Board has directed that the percentage increase in the national average weekly wage (NAWW) be used rather than the percentage increase in minimum wage or cost of living. The NAWW is based on the national earnings of production or non supervisory workers on private non agricultural payrolls and represents the average of those earnings during the three consecutive calender quarters ending on June 30 of each particular year as obtained from the Bureau of Labor Statistics. LHCA Bulletin No. 90-1. Richardson v. General Dynamics Corp., 23 BRBS 327 (1990). The use of the percentage change in the NAWW insures that a claimant's wage earning capacity is considered on an equal footing with a determination of the average weekly at the time of the injury.

In determining wage earning capacity Section 8(h) provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. Where claimant's post-injury employment is short lived, it does not constitute realistic and regular work available to claimant in the open market and as such does not truly reflect claimant's post injury wage earning capacity. Edwards v. Director, OWCP, 999 F. 2d 1374 (9th Cir. 1993), *cert denied*, 114 S. Ct. 1539(1994).

In this case, I find that Claimant's wage earning capacity was fairly represented by his annual wages of $11,300 at Holy Family and $17,000 annual wages at the City of Lafayette. When adjusted for inflation Claimant's wage with the City of Lafayette amounted to $6.80 per hour or $272.00 per week. Claimant's wage at Holy Family when adjusted by inflation by using the percentage change in the NAWW (23.88%) results in a weekly wage of $11,330- $2705.60 ($11,330 x.2388)= $8,624.40 divided by 52= $165.85.

D. Interest and Attorney Fees

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724(1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961(1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..."

Grant v. Portland Stevedoring Company, et al., 16 BRBS 267(1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file

any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant permanent total disability from March 26, 1992 when he reached maximum medical improvement until August 31, 1988 based upon an average weekly wage of $782.48 with a corresponding compensation rate of $521.66 pursuant to Section 908 (a) of the Act.

2. Employer shall pay to Claimant pursuant to Section 908 (c)(21) permanent partial disability from September 1, 1998 to October 10, 1999 based upon 66 2/3 % of the difference between an average weekly wage of $782.48 and $165.85 (Claimant's average weekly earnings adjusted for inflation at Holy Family Catholic School) resulting in a compensation rate of $411.09.

3. Employer shall pay to Claimant pursuant to Section 908 (c)(21) permanent partial disability from October 11, 1999 to present and continuing based upon 66 2/3% of the difference between an average weekly wage of $782.48 and $272.00 (Claimant's average weekly earnings adjusted for inflation at the City of Lafayette) with a corresponding compensation rate of $340.32.

4. Employer shall receive a credit for all compensation paid since March 26, 1992.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52 week U.S. Treasury Bill Yield immediate prior to the date of judgment in accordance with 28 U.S.C. § 1961.

6.. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

ORDERED this 8TH day of January, 2001, at Metairie, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge